

BEFORE THE DEPARTMENT OF ADMINISTRATION  
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF PUBLIC HEARING ON
ARM 2.21.4022 and 2.21.4028	)	PROPOSED AMENDMENT
pertaining to equal employment	)	
opportunity, nondiscrimination, and	)	
harassment prevention	)	

TO: All Concerned Persons

1. On December 21, 2012, at 9:00 a.m., the Department of Administration will hold a public hearing in Room 136 of the Mitchell Building, at 125 N. Roberts Street, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Administration will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on December 14, 2012, to advise us of the nature of the accommodation needed. Please contact John Pavao, Department of Administration, P.O. Box 200127, 125 N. Roberts Street, Helena, MT 59620-0127; telephone (406) 444-3984; Montana Relay Service 711; FAX (406) 444-0703; or e-mail jpavao@mt.gov.

3. The rules proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

2.21.4022 CONFIDENTIALITY REQUIREMENTS (1) Agency managers shall make every attempt to protect the privacy of individuals involved in the complaint process; however, individual privacy cannot be guaranteed.

~~(2) Employees involved in the complaint process (e.g., complainant, accused, witnesses, etc.) may not discuss the complaint or investigation with anyone other than management, the EEO officer, ADA coordinator, human resources manager, investigator, union representative, or legal counsel. Discussing the complaint or investigation with individuals who do not have an official need to know may result in disciplinary action under the ARM Title 2, chapter 21, subchapter 65, Discipline Policy.~~

(2) Agency managers may not prohibit employees from discussing a complaint or ongoing investigation with coworkers unless management conducts an individualized assessment and demonstrates that one of the following factors exists:

- (a) there are witnesses in need of protection;
- (b) evidence is in danger of being destroyed;
- (c) testimony is in danger of being fabricated; or
- (d) there is a need to prevent a cover-up.

(3) Agency managers shall document their rationale for requiring that employees refrain from discussing a complaint or ongoing investigation.

(3)(4) The human resource staff shall maintain the investigative report and supporting documents in a secure, confidential case file separate from the regular employee file.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes amending this rule to promote consistency with a July 30, 2012, National Labor Relations Board (NLRB) decision, *Banner Health System d/b/a/ Banner Estrell Medical Center and James A. Navarro*, 358 NLRB No. 93. The NLRB held that an employer violated employees' right to engage in concerted activities for their mutual aid and protection under the National Labor Relations Act (NLRA) by maintaining a rule prohibiting employees from discussing ongoing investigations of employee misconduct. The NLRA and the Montana Collective Bargaining for Public Employees Act give employees the right to organize, form, join, or assist a labor union, to bargain collectively, or to engage in other concerted activities for mutual aid or protection (39-31-201, MCA). The NLRB concluded, before prohibiting an employee from discussing a pending investigation, an employer must conduct an individualized assessment and be able to demonstrate that a legitimate business reason outweighs the employee's rights under the NLRA. The employer must consider whether (1) there are witnesses in need of protection; (2) evidence is in danger of being destroyed; (3) testimony is in danger of being fabricated; or (4) there is a need to prevent a cover-up. Employers cannot make blanket rules and must consider these factors before requiring that employees refrain from discussing the complaint or pending investigation.

2.21.4028 INITIATING AN EXTERNAL COMPLAINT (1) In addition to the internal complaint process, complaints may be filed with the following agencies:

(a) Montana Human Rights Bureau (~~HRB~~), 1625 11th Avenue, P.O. Box 1728, Helena, MT 59624-1728, (406) 444-2884, (800) 542-0807, TTY (406) 444-0532; or email <http://ord.dli.mt.gov/humanright/hrhome.asp>; or

(b) United States Equal Employment Opportunity Commission (EEOC) San Francisco District Office, 350 The Embarcadero, Suite 500, San Francisco, CA 94105-1260, (800) 669-4000, TTY (800)-669-6820; or email [www.eeoc.gov](http://www.eeoc.gov).

(2) Jurisdiction may vary based on the nature of the complaint. For example, neither the ~~HRB~~ Human Rights Bureau nor the EEOC considers complaints based on sexual orientation, culture, social origin or condition, or ancestry.

(3) The ~~HRB~~ Human Rights Bureau or ~~EEOC~~ must receive the complaint within 180 days of when the alleged incident discriminatory practice occurred or when first was discovered unless the person has filed an internal complaint. ~~If the complainant uses the internal complaint process, they will have 300 days from the alleged incident to file a complaint with the HRB or EEOC.~~ A person who files an internal complaint under these rules has 180 days from the conclusion of the internal investigation to file a complaint with the Human Rights Bureau if management completes the investigation within 120 days of when the alleged discriminatory practice occurred or was discovered. If management does not complete the

investigation within 120 days, the person must file a complaint with the Human Rights Bureau within 300 days of when the alleged discriminatory practice occurred or was discovered.

(4) The EEOC must receive the complaint within 300 calendar days from the date the discrimination took place if the Human Rights Bureau enforces a law prohibiting employment discrimination against the same protected class. Otherwise, the complaint must be filed with the EEOC in 180 days.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes changes to this rule to provide greater detail and clarity concerning the timelines for filing complaints with the Human Rights Bureau and EEOC. Timelines for filing complaints with the Human Rights Bureau vary by when the alleged discrimination occurred or was discovered and whether a charging party filed an internal complaint. The current rule does not cover the various scenarios in sufficient detail to address each potential situation.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to John Pavao, Department of Administration, PO Box 200127, Helena, Montana 59620; telephone (406) 444-3796; fax (406) 444-0703; or e-mail [jpavao@mt.gov](mailto:jpavao@mt.gov), and must be received no later than 5:00 p.m., December 21, 2012.

5. John Pavao, Department of Administration, has been designated to preside over and conduct this hearing.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this department. Persons who wish to have their name added to the mailing list shall make a written request which includes the name and mailing address or e-mail address of the person to receive notices and specifies that the person wishes to receive notices regarding State Human Resources Division rulemaking actions. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 4 above or may be made by completing a request form at any rules hearing held by the department.

7. An electronic copy of this proposal notice is available through the department's web site at <http://doa.mt.gov/administrativerules.mcp>. The department strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that if a discrepancy exists between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department works to keep its web site accessible at all times, concerned persons should be aware that the web site may

be unavailable during some periods, due to system maintenance or technical problems.

8. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

By: /s/ Janet R. Kelly  
Janet R. Kelly, Director  
Department of Administration

By: /s/ Michael P. Manion  
Michael P. Manion, Rule Reviewer  
Department of Administration

Certified to the Secretary of State November 13, 2012.